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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

SAM JOSEPH BATTAGLIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Sam Joseph Battaglia, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming a judgment of conviction entered by the United States District Court for the Northern District of Illinois.

OPINIONS BELOW

The opinions of the Court of Appeals are not yet reported and are printed in the Appendix to this Petition (Appendix A, Appendix B). Appendix B is an opinion denying the Petition for Rehearing.

JURISDICTION

The judgment of the Court of Appeals was entered on March 17, 1969, Appendix A. Petition for Rehearing was denied by a subsequent opinion and order on May 7, 1969. The jurisdiction of this Court was invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. When the son of a notorious, reputed gangster is selected for prosecution for alleged violation of the Military Selective Service Act while he is father of two dependent children and supports a dependent wife, (thus to be properly classified as 3-A, a deferred class), and his conviction rests on construction of equivocal regulations and the petitioner's equivocal answers to a form questionnaire, and the petitioner has repeatedly volunteered for military service, by induction, and at recruiting stations, which efforts have been frustrated by the pending prosecution, and the United States Attorney's seizure of his file from his Selective Service Board for use in the prosecution, can the petitioner's conviction be held to be based upon "deliberate purpose not to comply with the Selective Service Act or the regulation issued thereunder"?

2. May the Military Selective Service Act be used to defeat attempts to serve in the Armed Forces?

3. Did the petitioner receive equal treatment and protection under law when his prosecution and conviction constituted a departure from expressed policy of the Department of Justice and distorted the spirit and purpose of the Military Selective Service Act which was designed to secure military servicemen and not convicts?

4. a.) May a conviction partially based upon in-custodial inculpatory statements extracted from a naive 22 year old defendant, who was married at age 16 and is a high school dropout, where the record shows the defendant was not informed he had the right to an attorney then and there before questioning, and where the record is silent as to whether the defendant ever affirmatively waived his rights to remain silent and to have counsel, be upheld by the Seventh Circuit Court of Appeals in conflict with the decisions of this Court and other Circuit Courts of Appeals?

b.) Is not a defendant denied due process of law, and is not Rule 16 of the Federal Rules of Criminal Procedure violated, when the prosecution denies to the Court that it has statements of the defendant so that the defendant is prevented from having a hearing on a motion to suppress his statements which were extracted in violation of his Constitutional rights and when testimony of the statements are subsequently admitted into evidence against the defendant over his specific objection, and proof of their existence is established by the Section 3500 T. 18, U.S.C. statement of an F.B.I. agent who testified to the statements of the defendant.

5. May a Court of Appeals fail to remand a case to the District Court for proceedings consistent with the decisions of this Court and instead conduct an *in camera*

inspection of materials filed by the government and said to be obtained by use of illegal electronic eavesdropping and make a determination of irrelevancy with no hearing afforded the defendant?

6. Is the Military Selective Service Act, as it is being applied, unconstitutional?

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8, Clause 11, Constitution of the United States

> "The Congress shall have Power . . . To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;"

Amendment V, Constitution of the United States

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VI, Constitution of the United States

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to

have compulsory process for obtaining Witnesses in his favor, and to have Assistance of Counsel for his defence."

STATUTE INVOLVED

Title 50 APP., U.S.C.

"§ 462. *Offenses and Penalties.*

(a) * * * Any other person charged as herein provided with the duty of carrying out any of the provisions of this Title (sections 451-454 and 455-471 of this Appendix) or the rules or regulations made or directions given there, who shall knowingly fail or neglect to perform such duty, * * * and any person who shall knowingly make, or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this Title (said sections), or rules, regulations or directions made pursuant thereto, * * * shall, upon conviction in any District Court of the United States of competent jurisdiction, be punished by imprisonment for not more than 5 years or a fine of not more than $10,000, or by both such fine and imprisonment, * * *"

REGULATIONS INVOLVED

32 Code of Federal Regulations:

"§ 1622.30 Class III-A: Registrant with a child or children; and registrant deferred by reason of extreme hardship to dependents.

(a) In Class III-A shall be placed any registrant who has a child or children with whom he maintains a bona fide family relationship in their home and who is not a physician, dentist or veterinarian, or who is not in an allied specialist category which may be announced by the Director of Selective Service after

being advised by the Secretary of Defense that a special requisition under authority of section 1631.4 of these regulations will be issued for the delivery of registrants in such category.

(b) In Class III-A shall be placed any registrant whose induction into the armed forces would result in extreme hardship (1) to his wife, divorced wife, child, parent, grandparent, brother, or sister who is dependent upon him for support, or (2) to a person under 18 years of age or a person of any age who is physically or mentally handicapped whose support the registrant has assumed in good faith: *Provided,* That a person shall be considered to be a dependent of a registrant under this paragraph only when such person is either a citizen of the United States or lives in the United States, its Territories, or possessions.

(c) (1) The term 'child' as used in this section shall include a legitimate or an illegitimate child from the date of its conception, a child legally adopted, a stepchild, a foster child, and a person who is supported in good faith by the registrant in a relationship similar to that of parent and child but shall not include any person 18 years of age or over unless he is physically or mentally handicapped."

§ 1642.4 Declaration of delinquency status and removal therefrom.

(a) Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form No. 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153), the local board may declare him to be a delinquent.

(b) When the local board declares a registrant to be a delinquent, it shall enter a record of such action and the date thereof on the registrant's Classification

Questionnaire (SSS Form No. 100) and shall complete a Delinquency Notice (SSS Form No. 304), in duplicate, setting forth the duty or duties which the registrant has failed to perform. The local board shall mail the original to the registrant at his last known address and file the copy in his Cover Sheet (SSS Form No. 101).

(c) A registrant who has been declared to be a delinquent may be removed from that status by the local board at any time. When the local board removes a registrant from delinquency status, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form No. 100) and shall advise the registrant of such removal by letter a copy of which shall be filed in his Cover Sheet (SSS Form No. 101).

§ 1642.10 Restriction on classification and induction of delinquents.

No delinquent registrant shall be placed in Class I-A or Class I-A-O under the provisions of § 1642.12 or shall be ordered to report for induction under the provisions of § 1642.13 or § 1631.7 of this chapter unless the local board has declared him to be a delinquent in accordance with the provisions of § 1642.4 and thereafter has not removed him from such delinquency status.

§ 1642.11 Registration and classification of unregistered delinquents.

Whenever a person who is delinquent because he has not registered reports or is brought before a local board, he shall be registered in the normal manner, except that if the local board with which he registers determines that because of his delay in registering he should be declared to be a delinquent under the provisions of section 1642.4 and processed for induction as a delinquent, the local board may enter in item

2 of the Registration Card (SSS Form No. 1) an address within its jurisdiction. If the local board makes such determination and retains jurisdiction of the registrant, it shall, as soon as possible after the registration, declare the registrant to be a delinquent and classify him as provided in section 1642.12.

§ 1642.12 Classification of delinquent registrant.

Any delinquent registrant between the ages of 18 years and 6 months and 26 years and any delinquent registrant between the ages of 26 and 28 who was deferred under the provisions of section 6(e) (2) (A) of the Universal Military Training and Service Act, as amended, which were in effect prior to September 3, 1963, and any delinquent registrant between the ages of 26 and 35 who on June 19, 1951, was or thereafter has been or may be, deferred under any other provision of section 6 of such Act, including the provisions of subsection (c) (2) (A) in effect on and after September 3, 1963, may be classified in or reclassified into Class I-A or Class I-A-O, whichever is applicable, regardless of other circumstances: *Provided,* That a delinquent registrant who by reason of his service in the Armed Forces is eligible for classification into Class IV-A may not be classified in or reclassified into Class I-A or Class I-A-O under this section unless such action is specifically authorized by the Director of Selective Service.

§ 1642.13 Certain delinquents to be ordered to report for induction.

The local board shall order each delinquent registrant between the ages of 18 years and 6 months and 26 years and each delinquent registrant between the ages of 26 and 28 who was deferred under the provisions of section 6(c) (2) (A) of the Universal Military Training and Service Act, as amended, which were in effect prior to September 3, 1963, and each delinquent registrant between the ages of 26 and 35 who

on June 19, 1951, was, or thereafter has been or may be, deferred under any other provisions of section 6 of such Act, including the provisions of subsection (c) (2) (A) in effect on and after September 3, 1963, who is classified in or reclassified into Class I-A or Class I-A-O to report for induction in the manner provided in section 1631.7 of this chapter unless (a) it has already done so, or (b) pursuant to a written request of the United States Attorney, the local board determines not to order such registrant to report for induction.

§ 1642.14 Personal appearance, reopening, and appeal.

(a) When a delinquent registrant is classified in or reclassified into Class I-A or Class I-A-O under the provisions of this part, a personal appearance may be requested and shall be granted under the same circumstances as in any other case.

(b) The classification of a delinquent registrant who is classified in or reclassified into Class I-A or Class I-A-O under the provisions of this part may be re-opened at any time before induction in the discretion of the local board without regard to the restrictions against re-opening prescribed in § 1625.2 of this chapter.

(c) When a delinquent registrant is classified in or reclassified into Class I-A or Class I-A-O under the provisions of this part, an appeal may be taken under the same circumstances and by the same persons as in any other case."

RULES INVOLVED

Rule 16, Federal Rules of Criminal Procedure

"Rule 16. Discovery and Inspection

(a) Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony. Upon motion of a defendant the court may order the attorney for the government to permit the defendant

to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and (3) recorded testimony of the defendant before a grand jury.

* * *

(g) Continuing Duty to Disclose; Failure to Comply. If, subsequent to compliance with an order issued pursuant to this rule, and prior to or during trial, a party discovers additional material previously requested or ordered which is subject to discovery or inspection under the rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional material. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances."

STATEMENT OF THE CASE

Nature of the Case and Its Disposition

The petitioner, Sam Joseph Battaglia, was indicted in the Northern District of Illinois, Eastern Division, on May 24, 1966. The indictment contained three counts alleging violations of Title 50, Appendix, United States Code, Section 462.

Specifically, Count 1 charged that on or about February 25, 1964, the petitioner wilfully and knowingly made false statements to his Local Board, *i.e.*, that he was then living with his wife, and that his children were then living in his home. Count 2 charged that on or about March 30, 1966, the petitioner wilfully and knowingly made false statements substantially the same as in Count 1. Count 3 charged that from and after December 5, 1964, the petitioner wilfully and knowingly failed, neglected and refused to perform a duty required of him, *i.e.*, to notify the Selective Service System that his marriage had been dissolved on November 24, 1964 (A. 2-3).

The petitioner subsequently filed a motion to dismiss the indictment wherein, amongst other complaints, he specifically complained that Count 3 of the indictment was invalid since it charged the petitioner violated a duty requiring notice of a fact which "might" change a registrant's status, and that by reason of the use of the word "might", the requirement is unconstitutional and void as being vague, indefinite and uncertain (A. 4-6). The petitioner also filed motions for production of statements, and admissions by the petitioner (A. 7), and for production, inspection and suppression of all evidence obtained by electronic eavesdropping (A. 7), which motions were denied (A. 7, 8).

Throughout the proceedings, whenever questioned by the Court, the petitioner always replied that he would be willing to submit to induction (A. 25, 26, 47, 48, 53, 54 and 55). Motions for acquittal at the close of the Government's case and at the close of all evidence, were denied (A. 8).

Trial was had before the Court sitting without a jury, and the Court entered a finding of guilty as to Counts 1 and 3 of the indictment, and acquitted the petitioner on Count 2 (A. 8-9). The petitioner was sentenced to the custody of the Attorney General or his authorized representative for imprisonment for a period of four years on each of Counts 1 and 3 of the indictment, to run concurrently (A. 9). Subsequently, the petitioner filed Motions in Arrest of Judgment (A. 9-10), for a Judgment of Acquittal Notwithstanding the Finding of the Court, or in the Alternative, for a New Trial (A. 11-13), and for a New Trial based upon additional evidence which should be heard in order to avoid a miscarriage of justice (A. 13-15). These motions were denied (A. 24).

The Court did enter an order reducing the sentence to 2 years' imprisonment subject to Section 4209(a)(2), Title 18, U.S.C. (A. 24).

STATEMENT OF THE FACTS

Arraignment

The petitioner was arraigned on the indictment on June 17, 1966, and at that time, entered his plea of Not Guilty. In answer to questioning by the Court, the petitioner indicated that he had no objection to serving in the Armed Services, and that he would be happy to go into the service (A. 25-26).

Evidence at the Trial

Dorothy S. Steinert testified that she was the Division Supervisor of Division 7 of the Selective Service System which included Local Board 108 in Forest Park, Illinois (A. 26). She went on to identify the various government exhibits which were documents included in the Selective Service file of the petitioner, Sam Joseph Battaglia (A. 27-28, 35).

Government Exhibit 1 is the petitioner's registration card. Government's Exhibit 2-A is the petitioner's classification questionnaire, and Government's Exhibit 2-B is a current information questionnaire which bore a date of March 30, 1966. The petitioner's classification as indicated on Government's Exhibit 2-A is "3-A". This classification does not conform to the classification indicated on the form which was received by the petitioner (Defendant's Exhibit 1), which indicated a classification of 2-S (A. 28).

Government's Exhibit 2-B, which is the current information questionnaire, indicated that the defendant was married and gave the date of the marriage as March 27, 1966.

It further indicated that the petitioner had two children. The document bore an execution date of March 27, 1966 and bore a further notation that it had been received by the Selective Service office on March 20, 1966 (A. 28).

Dorothy Steinert went on to explain, in reply to the Court's questioning, the processes followed by the Selective Service System on classifying registrants. She indicated that if a registrant files false information or does something else "wrong", that the Local Board first investigates to determine whether the registrant is a delinquent. If they so decide, they then declare the registrant a delinquent and he is then subject to being inducted immediately (A. 29-32).

> "It does state that if the Board feels that the registrant is a delinquent, that they can declare him a delinquent, and then they give him the opportunity, like I said before, of clearing his delinquency. If he does not clear it to the satisfaction of the Local Board, then there is a regulation which states he will be classified 1-A." (A. 31-32).

Government's Exhibit 2-A, which was the petitioner's classification questionnaire, indicated that the registrant was married, that he lives with his wife, that they married on May 17, 1960, and that he has two children who live with him in his home (A. 32). The witness indicated, in response to questioning by the Court, that even if a man became divorced, and was no longer living with his children, that if he was supporting them, he could still be entitled to a 3-A classification as a father if he showed hardship and deprivation to the children if he were to be inducted (A. 32-35).

On cross-examination, *Dorothy Steinert* stated that the petitioner's Selective Service file had been out of her pos-

session since 1966, "for two years", and that there had been no entries made in the file, nor any action taken by the Local Board, since it was removed by the Government (A. 37). She further described the notation appearing on the cover sheet of the file as stating, "4/6/66, Take no action, see me, Kinzer and Dallman". She did not know whether or not this notation was the reason why the usual delinquency action was not followed against the petitioner (A. 38).

The Court admitted an exemplified, certified copy of the decree of divorce entered on November 2, 1964 in the Circuit Court of Cook County over objection, limited to the date and order of divorce, including the support order (A. 39).

Daniel Frank Ligocki testified that he is a building manager for Owners Management, Inc., and as such, he manages the King Arthur's Apartments in Northlake, Illinois. Mr. Ligocki testified that in the latter part of 1965 and the early part of 1966, the petitioner, Sam Joseph Battaglia, was a tenant in the King Arthur Apartments (A. 40). He further stated that it was a policy of Owners Management, Inc., that they would not lease apartments to persons having children over a year and a half of age. This testimony was allowed over the petitioner's objection (A. 41). Mr. *Ligocki* further stated on cross-examination, that on occasions, he had seen the petitioner on the premises of King Arthur Apartments while he was there in performance of petitioner's work duties, which was collection of money from coin-operated washing machines (A. 42).

John E. Dallman testified that he is a Special Agent of the Federal Bureau of Investigation. He stated that on May 12, 1966, pursuant to an arrest warrant which had

been issued May 11, 1966 based upon a Complaint before the Commissioner, he and three other agents went to the petitioner's apartment, and there placed him under arrest (A. 42). Over the petitioner's objection, specifically as to the failure to warn the petitioner of his Constitutional rights, *Agent Dallman* testified to oral conversations between the petitioner and arresting agents. He stated that the petitioner told him, in answer to questioning, that he did not believe that he had advised his Selective Service Board concerning his divorce, but that he had advised the Board of his re-marriage during March of 1966.

In further response to questioning, the petitioner stated that he had separated from his wife about November, 1963 and had moved in with his family in Oak Park; that his divorce had become final during November or December of 1964. He said that the petitioner further stated that under the divorce decree, he was required to pay his wife $50.00 a week for the support of his two children. He also told the agents that during part of 1964, he had lived elsewhere than with his parents, and gave some information about his employment (A. 42-43).

> "The Witness: I asked him that if the Armed Services wanted to draft him, whether or not he would be willing to go, and he said he would if they did." (A. 43).

Over the petitioner's objection, Agent *Dallman* related that the petitioner had stated that while he was not working during 1965, his father had paid the $50.00 a week support (A. 43-44).

None of the statements or admissions of the petitioner, as testified to by Agent Dallman, were furnished the defendant on his pre-trial motion under amended Rule 16, F.R.Cr.P., for production of petitioner's statement and admissions (A. 7), which was denied (A. 8).

The petitioner's motion to strike Dallman's testimony concerning petitioner's statements and motion to suppress Dallman's testimony evidence as having been obtained in violation of Supreme Court standards were denied (A. 44).

On cross-examination, Agent *Dallman* stated that Agent *Kinzer* was with him at the time of the arrest, and it was *Kinzer* who had aided him in the investigation and who had made the Affidavit in the Commissioner's office. They did not have the warrant with them when they arrested the petitioner, and he was only advised that he was being arrested based on a warrant charging him with a violation of the Selective Service Act (A. 44).

Agent *Dallman* stated that it was Agent *Kinzer* who advised the petitioner, and *Dallman* did not recall *Kinzer* "going into great detail" (A. 44). Agent *Dallman* stated that the inscription on Government's Exhibit 2 appeared to be, "4/6/66 Take no action—See me, Kinzer or Dallman." He did not recall visiting the Local Board on that date, nor did he recall authorizing such a message (A. 45).

WALTER MUXR testified that he was the owner of building No. 25 in the King Arthur Apartments in Northlake, Illinois, and that during the period November 1, 1965 to May, 1966, the petitioner was a tenant in that building. He recalled seeing the petitioner once, walking out of the basement, when he assumed that the petitioner was taking money from the coin washing machines as part of his job. He did not recall ever seeing any children around the apartment. The witness stated that the management does not rent to families which have children (A. 46).

On cross-examination, the witness MUXR related that he did not have anything to do with the renting, and that he had seen the petitioner another time with a lady whom he knew as the petitioner's wife (A. 46).

The witness further stated that on one other occasion, he entered the apartment with a maintenance man and saw a lady whom he assumed was Mrs. Battaglia. He did not see any children at that time (A. 47).

During a colloquy between the Court and defense counsel, the Court was informed that the petitioner was willing to go into service, that he had explored the possibility of volunteering, but had been told that he would not be accepted with an indictment pending, and his position now was that, if processed, he would be glad to go (A. 47-48).

JOANNE ANDERSEN testified that she and her family lived in an apartment at 1440 N. First Avenue, Melrose Park, Illinois, during the years 1962 through 1966. At that time, she came to know the petitioner because he occupied an apartment in the same building. She stated that he moved out approximately a year and a half after she moved in, and that when he left, his wife and children continued to live there (A. 48).

On cross-examination, she stated, in response to a question as to how she knew that the petitioner had moved out,

> "I just assumed he had. His car wasn't around any more. He didn't come around. So I just assumed —" (A. 49).

She further stated that she did not especially watch for the petitioner, and that her assumption was based on the fact that she did not see him around, although she didn't know the last time that she had seen him (A. 49).

BEVERLY PRESTON testified that she had met the petitioner through a friend, and thereafter saw him just about every night (A. 49). She further stated that in

one particular conversation, she had asked the petitioner why he hadn't been drafted, and that he replied that the Draft Board didn't know he wasn't married. She further related that she had another conversation with the petitioner in which he told her that his father was supporting his children (A. 50). The petitioner's objection and motions to strike were overruled (A. 50).

Government rests (A. 50).

Petitioner moves for acquittal at the close of the government's case; denied (A. 50).

EDWARD KINZER, JR., called by the defense, testified that he was a Special Agent of the Federal Bureau of Investigation. That in the spring of 1966, he came in contact with the Selective Service file of the petitioner in the United States Attorney's office (A. 50).

Agent *Kinzer* did not know who wrote the inscription on the face of the file, but he guessed that it was probably the Clerk of the Board, because that was about the date he had called her (A. 51).

Agent *Kinzer* assumed that the Assistant United States Attorney had called for the file because subsequently, the Assistant United States Attorney called him and stated that he had the file, and would the agent like to come over and review it (A. 51). Agent *Kinzer* related that it was he who had filed the complaint before the United States Commissioner and stated that there was nothing in the Complaint concerning whether the petitioner's children were living in his home, but that it only referred to a failure to report the petitioner's divorce (A. 51).

Petitioner rests (A. 51).

Government rests (A. 51).

PROCEEDINGS ON NOVEMBER 29, 1967

The Court indicated that it was well aware of the tradition that whatever the cause for delinquency, that when persons accused of violations of the Selective Service Act were arrested, they are usually given an opportunity to go into service. The Court further stated that it was a matter of tradition that the prosecutor would go to the man before an indictment and give him an opportunity to go into service (A. 52). The Court was again apprised by petitioner's counsel that the petitioner would be satisfied to volunteer into service, but that they would not take him with his indictment, as a volunteer, and that if the Board could induct him, he would be glad to comply with their order of induction (A. 53). The Court further stated that it hoped the prosecution was as intent upon getting draft card burners and other active violators of the Selective Service Act into jail as it was intent upon getting a Sam Battaglia because his father is an "infamous gangster" (A. 53-54).

Prior to sentencing the petitioner, the Court asked the petitioner whether he was willing to go into service, and received an affirmative answer. The Court thereupon told the Government that it was willing to vacate the finding of guilty and would dismiss the indictment, providing the petitioner submitted to induction (A. 54). After sentencing the petitioner, the same question was asked of the petitioner, and the same response made. The Court again made the same statement to the Government (A. 55).

The Court found the petitioner guilty on Counts 1 and 3 of the indictment and acquitted him on Count 2 (A. 55).

REASONS FOR GRANTING THE WRIT

1. The charge in Count 1 is that on or about February 25, 1964, the petitioner did make certain false statements to his Selective Service Board, to the effect that he did wilfully and knowingly state that he was then and there living with his wife and that his children were then living with him in his home (A. 2).

The evidence of witness Dorothy S. Steinert was to the effect that Gov. Ex. 2-A, a Government classification questionnaire and a form used by the Board to obtain information on which to base classification, was mailed to the registrant-defendant on February 17, 1964 and received back by the Board on February 25, 1964 (A. 28-29). It is significant that the address to which it was mailed was the domicile and actual residence of the petitioner's wife and children at that time, and of the petitioner as indicated by the prompt reply to the mail addressed to him at that address. No divorce then existed (A. 3, 39), and there is no question about his then bona fide family relationship with his dependent children in their home.

The address of the petitioner and his family at that time was 1440 N. First Avenue, Melrose Park, Illinois (A. 37).

The evidence was insufficient to establish beyond a reasonable doubt that on February 25, 1964, the date of his returned questionnaire, received by the petitioner at his home and the home of his wife and children at 1440 No. First Avenue, Melrose Park, Illinois, the petitioner had any other home.

The evidence pertaining to the charge that the petitioner misrepresented, in his answers to the questionnaire sent to him, by the Draft Board, at 1440 N. First Avenue, Melrose Park, Illinois, the undisputed home of his dependent children and wife at that time and his legal residence and home, and actual mailing address for Selective Service purposes, is contained apparently in the testimony of three government witnesses, John E. Dallman (A. 42-45), Joanne Anderson (A. 48-49), and Beverly Preston (A. 49-50).

Dallman's testimony (A. 42-45), which consisted of relating admissions made by the petitioner while he was in custody after his arrest on a different charge, did not specifically refute or deny or contradict the petitioner's statement in his questionnaire dated February 25, 1964 that he was married and had two dependent children with whom he had a bona fide relationship in their home. Mr. Dallman's testimony does not reveal that he ever asked the petitioner whether he was living with his wife and children in his home at 1440 N. First Avenue, Melrose Park, Illinois on February 25, 1964. Of course, Mr. Dallman's testimony was admitted over objections as being evidence illegally obtained, in violation of the standards set down by the Supreme Court, and also was concealed from the petitioner and the Court by the Government's misrepresentation in its Answer to motion for production of the petitioner's statements and confessions under Rule 16(a). These matters are discussed hereafter.

The testimony of Joanne Anderson (A. 48-49), that the petitioner moved out about a year and a half after she moved into the building at 1440 N. First Avenue, Melrose

Park, Illinois in June, 1962, was completely destroyed by her testimony on cross-examination (A. 48-49).

> "Q. Now, how do you know that he moved out?
> A. I just assumed he had. His car wasn't around anymore. He didn't come around. So I just assumed. . ." (Tr. 275).
>
> "I didn't especially watch for him. My assumption is based on the fact that I did not see him around (Tr. 276). I don't know the last time I saw him in the building (Tr. 277)."

Another witness, who testified to an unproduced admission and a statement against interest by the petitioner, was Beverly Preston, who testified that when she saw him in December of 1963 at her home, the defendant told her he was living at his mother's and that he had been there for some time (A. 49). She said that after that, she heard from him every 3 to 6 months by telephone, and that during one of these conversations, he told her that he was living at his mother's (A. 49). Her testimony does not specifically or substantially controvert or contradict the petitioner's answer given in his questionnaire concerning his residence with his children and wife on February 25, 1964, the date of the questionnaire.

The nature of the questionnaire involved, which is Gov. Ex. 2-A, is of interest. Line 1(a) gives the registrant four choices, with a box for a check in front of each choice. The first is, "have never been married"; the second one is, "am a widower"; the third is, "am divorced"; the fourth is, "am married". The petitioner put on "X" in the one marked "am married", and without dispute this was true on February 25, 1964, the date of the questionnaire.

Line 1(b) gave the petitioner two choices, "DO" or "DO NOT live with my wife; if not, her address is . . .". The petitioner answered by putting a cross in the box in front of "DO".

Line 1(c) requested the place and date of marriage, which was filled in by the petitioner, and this is not questioned by the government in its charge.

Line 2 reads, "I have 2 children under 18 years of age of whom 2 live with me in my home."

The petitioner's conclusion that he was married is undisputed because the date of divorce in the decree offered by the Government as Gov. Ex. 3, shows November 24, 1964 (A. 39), 9 months after the questionnaire, alleged to be false, was filed. The petitioner did receive his questionnaire addressed to him at the home where his wife and children were living and where he claimed to be living on February 25, 1964, when he promptly complied with the information requested in the questionnaire.

No substantial proof was offered by the Government that the information supplied on February 25, 1964 was false then. Certainly, the evidence is far short of proof beyond a reasonable doubt or of any proof that the petitioner had the "deliberate purpose not to comply with the Selective Service Act or the regulation issued thereunder". *Ward* v. *United States*, 344 U.S. 924, 97 L.Ed. 711, 712; *Graves* v. *United States*, 252 F.2d 878.

It is interesting to note that Gov. Ex. 2-A, which is the classification questionnaire involved in Count 1, on Page 4 shows that the petitioner had two years of high school, and he was thus what is called, "a high school dropout". He was born February 25, 1944, and thus on

February 25, 1964, was twenty years of age. He had a work record, which showed his willingness to work, as an assistant plumber, bookkeeper, and the evidence shows, as a coin collector from washing machines (A. 42, 46). It is obvious from the record that his family name did not make him readily acceptable for employment by many employers. It is suggested that this young man is one of the "disadvantaged", if any exist, and is deserving of a close scrutiny of the record claimed by the government to support his guilt.

As to Count 3, the charge is that the petitioner did "wilfully and knowingly fail, neglect and refuse to perform a duty required of him under the Universal Military Training Service Act, Title 50 APP., United States Code, Section 451-473, and the rules and regulations made pursuant thereto, requiring that notice of a fact which *might change* a registrant's status be given by a registrant to his local board within 10 days after registrant has knowledge thereof, to wit, he did fail, neglect and refuse to notify Selective Service System Local Board No. 108 that his marriage had been dissolved on November 24, 1964; in violation of Title 50 APP., United States Code, Section 462." (A. 3). (Emphasis supplied)

The basis for the acquittal of the petitioner on Count 2 at the close of the Government's evidence (A. 1), was that the petitioner's filing of a second questionnaire received by him in the mail from the Local Draft Board disclosing his second marriage, was executed with the intention of disclosing his divorce and could not fail to give notice of his divorce. Of course, this second questionnaire filed by the petitioner March 30, 1966, and without any knowledge that the F.B.I. was seeking to find him in

violation of the Act, gave notice that he had been divorced because he stated his date of marriage to be March 27, 1966 when the petitioner knew, of course, that he had a prior questionnaire on file showing a different marriage, and thus it was obvious that he had been divorced, as the Trial Judge below found.

These circumstances do not justify a conclusion that the petitioner had the "deliberate purpose" to defeat this Act. His constant and consistent expression of willingness to enter the Armed Forces, if acceptable, and his attempts to volunteer, all were thwarted by the retention of his file by the United States Attorney who deprived the Local Board of the opportunity to proceed with its duties in determining any charge of delinquency (A. 22, 23, 31).

It is impossible to determine the basis for the trial judge's findings of guilt on Counts 1 and 3 in contrast to acquittal on Count 2. Consistency may not be necessary, but it must be clear that the conviction does not rest upon a theory which could not constitutionally support a verdict or finding of guilt. *Street* v. *New York*, ... U.S. ....., 22 L.Ed. 2d 572, 581, and cases cited therein.

2. The petitioner submits that the action of the United States Attorney in bringing this prosecution and obtaining conviction was arbitrary and discriminatory, and thereby denied this petitioner "equal protection of the law", as that right is contained in the "due process clause" of the Fifth Amendment to the Constitution of the United States.

The evidence in the case at bar shows that from the time the petitioner was first arrested by agents of the Federal Bureau of Investigation, to the present time, the peti-

tioner has consistently expressed his willingness to serve in the Armed Forces of the United States (A. 43, 25-26, 47-48, 53, 54, 55, 13-15, 17-18, 18, 19, 20, 21-22).

The trial Court recognized that the traditional practice of the federal government in "draft" cases is that no matter what the alleged violation was, if the defendant were willing to enter the Armed Forces, then the prosecution was dropped, and the defendant was given the opportunity to enter the service (A. 52).

The learned Trial Judge also recognized that the action of the United States Attorney in proceeding with this prosecution, was, in the Judge's words, pursuing "a governmental vendetta against the family of this young man .... " (A. 25).

The Court also recognized that the prosecution was a "prosecution of our war against organized crime", and that the government was "intent upon getting a Sam Battaglia in [jail] just because his father is a—what did you call it, an infamous gangster?" (A. 54).

Despite the perception of the Trial Judge in recognizing the arbitrary, capricious, and discriminatory nature of the instant prosecution, he nevertheless declined to dismiss the prosecution and allow the petitioner to enter the Armed Forces free of the taint of conviction. In this matter, the trial Court erred, and the Court of Appeals erred in affirming.

More than the tradition, as stated by the Trial Judge (A. 52), of giving an accused violator of the Selective Service Act an opportunity to go into the Service, it appears that this is the policy of the United States Government as enunciated by the Department of Justice. That

Department, in the case of *Barry Jerome Wallace* v. *The United States*, No. 24744, in the United States Court of Appeals for the Fifth Circuit, stated, in a motion filed July 11, 1967:*

> "That it is the policy of the Department of Justice not to prosecute violations of the Universal Military Training and Service Act if such violation was not flagrant and the registrant is willing to submit to the induction procedure." (S.A. 1-2).

In that case, the defendant, Barry Jerome Wallace, had been convicted on a 2-Count indictment charging him with failing to keep his Local Board advised of his current address, and failure to report for induction. He was sentenced to five years' imprisonment and a $10,000.00 fine on each Count, to run consecutively.

The Government on July 11, 1967, moved the Court of Appeals for the Fifth Circuit to vacate the judgment of the District Court of the Southern District of Georgia and to remand the case with instructions to dismiss the indictment upon compliance of the defendant to report for and submit to induction (S.A. 1-2).

In discussing the case, the United States in its motion to remand, stated:

> "Where persons have violated the provisions of the statute, and are subject to prosecution thereunder, it is the tacit policy of the Department of Justice not to

* Copies of the Government's Motion, the Defendant's Answer, and the Order of the United States Court of Appeals for the Fifth Circuit, in that case, as well as other items in this case, have been reproduced at the end of this petition in a Supplemental Appendix and reference to them will be made by "S.A." followed by a page number.

prosecute if the violation was not flagrant and the registrant is willing to submit to the induction procedures. This policy has been adopted because it is more beneficial to the Government to have the registrant serving in the Armed Forces than in a penitentiary.

"Wallace's violation does not appear to be flagrant. He reported for induction on May 11, 1966, and apparently would have submitted if he had been found acceptable for service. He has consistently expressed a willingness to serve in the Armed Forces; he so stated to the Federal Bureau of Investigation prior to his indictment; he testified to that effect at his trial; and we have been informed that he is presently willing to submit to induction. * * *" (S.A. 5).

The United States Court of Appeals for the Fifth Circuit subsequently entered an order on August 4, 1967, granting the motion to vacate the judgment and remand with instructions to dismiss the indictment (S.A. 9-10).

The petitioner submits that in view of his consistent position that he is willing to submit to the induction procedure, and in fact attempted to enlist in each of the branches of the Armed Forces of the United States (A. 18, 19, 20), that the Government's action in proceeding with this prosecution to conviction, and in denying him the chance to enter the Armed Forces, denied him "equal protection of the law" as that right is contained in the Fifth Amendment to the Constitution of the United States. As the Court stated in *Rudder* v. *United States*, 226 F.2d 51, at P. 53, D.C. Cir.:

"* * * The Government * * * is still the Government. It must not act arbitrarily, for * * * it is subject to the requirements of due process of law. Arbitrary action is not due process."

The flagrancy of the prosecutors' discrimination against the petitioner in this case is demonstrated by the response of the Selective Service System from its National Headquarters in Washington, D. C., in response to a letter addressed to Gen. Hershey by the attorney for the defendant. This letter appears at A. 21-22, and deserves quotation:

"Dear Mr. Walsh:

This is in response to your letter of December 19, 1967, to General Hershey with respect to the case of Sam Battaglia.

The Selective Service System is prepared to forward Mr. Battaglia as a volunteer for induction. However, papers which must be forwarded with him are in his selective service file which is in the hands of the United States Attorney. Furthermore, Army Regulations provide that men who have filed and pending against them a criminal charge alleging violation of the selective service law, may be processed for induction and inducted, if otherwise acceptable, only upon receipt by the examining station of a letter (furnished directly to the examining station or through the local Selective Service Board) from the United States Attorney concerned with the prosecution which reflects that neither he nor the judge of the United States District Court concerned has any objection to the man's induction prior to judicial disposition of the charge.

If the United States Attorney will provide such a letter and make the file available to the local board, he will be forwarded promptly as a volunteer for induction.

Judge Parsons has been advised of our position.

Sincerely yours,

Daniel O. Omer (Signed)
Daniel O. Omer
Deputy Director"

It is submitted that the prosecution herein has characteristics of "Corruption of Blood" and of a "Bill of Attainder", both prohibited by the Constitution of the United States (see Article III, Section 3, Clause 2, and Article I, Section 9, Clause 3). In subjecting Sam Joseph Battaglia to conviction for "draft evasion", rather than affording him the opportunity to serve his country in the military service, Sam Joseph Battaglia was denied the protection of law afforded to Barry Jerome Wallace and thousands of others whose conduct has come into some claimed conflict with provisions of the Military Selective Service Act.

The action of the United States Attorney in seizing and holding the Selective Service file of the defendant, and in proceeding with this prosecution, denied this defendant the procedural due process which would have been followed by his Local Board. The normal procedure would have been that the Board would have determined whether the defendant was delinquent and if so, would have re-classified the defendant, and probably would have made him available for induction into the Armed Forces (Title 32, C.F.R., Sections 1642.4, 1642.10, 1642.12 and 1642.13). The defendant would have then, had he been re-classified, had a personal appearance and hearing if he so desired, and would have also had the rights of appeal within the Selective Service System (Title 32, C.F.R., 1642.14).

Such a procedure is consistent with the purpose of the Military Selective Service Act, as stated by Congress, in Title 50 Appendix, U.S. Code, Section 451. The gist of that statement is that the purpose of the Military Selective Service Act is to provide manpower for the Armed Forces of the United States.

The effect of this prosecution is only to convict a person chosen by the prosecutor for his name and family and has defeated the purpose of the Congress.

The denial of procedural due process to the defendant under the Military Selective Service Act requires the reversal of the conviction. *Olvera* v. *United States,* 5 Cir., 223 F.2d 880; *United States* v. *Stepler,* 3 Cir., 258 F.2d 310; *Stain* v. *United States,* 9 Cir., 235 F.2d 339; *United States* v. *Ransom,* 7 Cir., 223 F.2d 15.

3. On October 25, 1966, the petitioner filed his Motion for Production of statements and admissions by the defendant (A. 7). On November 7, 1966, the Government filed its Answer to that motion, denying that it had any admissions or statements subject to production under Rule 16 (A. 8).

On November 18, the Court entered its order denying the petitioner's motion (A. 8).

In the course of the trial, during the testimony of the prosecution witness, John E. Dallman, the prosecution elicited testimony concerning certain oral statements allegedly made by the petitioner, subsequent to his being taken into custody (A. 42). The petitioner specifically objected to the conversation and moved to suppress it as being in violation of the standards as set down by the United States Supreme Court (A. 42) (*Miranda* v. *Arizona,* 384 U.S. 436, 16 L.Ed. 2d, [redacted]4, 86 S.Ct. 1602; Rule 16 F.R.C.P.). This objection and motion was overruled.

Agent Dallman testified that after he and the other agents of the Federal Bureau of Investigation entered Mr. Battaglia's apartment on May 12, 1966, that one of the other agents told Mr. Battaglia that he was under

arrest, that they were agents of the Federal Bureau of Investigation, that Agent Kinzer told Mr. Battaglia "that he did not have to make any statement to us, that any statement he made could be used against him in Court; he told him he had a right to consult with an attorney or consult with anybody else if he so desired prior to making a statement, and if he could not afford an attorney, the Court would appoint one for him." (T. 179, A. 42).

Dallman then went on to relate the alleged conversation (A. 42-43).

On cross examination, Agent Dallman stated that he (Dallman) did not advise Mr. Battaglia, but that it was Agent Kinzer who advised him, and that he (Dallman) did not recall him (Kinzer) going into "great detail" (A. 44).

The United States Supreme Court in its decision in *Miranda* v. *Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 706, 86 S.Ct. 1602, laid down the rule that it was the burden of the prosecution to establish that any in-custodial statements were made voluntarily and with full knowledge of the petitioner's constitutional rights.

The petitioner submits that the prosecution failed to meet its burden. At no time, did the prosecution call Agent Kinzer to the stand, who would have been able to best testify as to what warnings he did give. Further, the statement of Agent Dallman that Agent Kinzer did not go into great detail, would appear to effectively rebut any contention by the prosecution that the petitioner had been adequately informed of his constitutional rights so that he would be able to make an intelligent and voluntary waiver thereof.

It is submitted that certainly, the prosecution failed to establish that the statements were voluntarily given beyond "a reasonable doubt", *Pea* v. *United States,* D.C. Cir., 397 F.2d 627; *United States* v. *Inman,* 4 Cir., 352 F.2d 954, 956.

The testimony of an F.B.I. agent that he overheard another agent give the "warnings" to the petitioner falls far short of proving that *Miranda* was complied with. The agent who was alleged to have given the "warnings" was available, and not called by the government, and the overhearing agent's testimony includes a statement that the agent who gave the "warnings" did not go into "great detail". (A. 44)

Irrespective of this, however, the "warnings" allegedly given were inadequate, if the only witness on the subject, agent Dallman's testimony, is considered. Dallman testified that he heard Agent Kinzer tell the petitioner "that he did not have to make any statement to us, that any statement he made could be used against him in Court; he told him he had a right to consult with an attorney or consult with anybody else if he so desired prior to making a statement, and if he could not afford an attorney, the Court would appoint one for him." (T. 179, A. 42).

In treating a "warning" almost identical with the one allegedly given this defendant, the United States Court of Appeals for the Fifth Circuit held that the warning was defective because the warning did not make it clear that if the defendant could not afford an attorney, that one would be provided prior to interrogation, *Lathers* v. *United States,* 396 F. 2d 524, 533-536. Also see *People* v. *Braun,* 98 Ill.App. 2d 5, 241 N.E.2d 25.

The Court in *Lathers* stated:

> "The *Miranda* warning must effectively convey to the accused that he is entitled to a government-furnished counsel here and now. If the words are subject to the construction that such counsel will be available only in the future, *Miranda* has not been obeyed.
>
> * * *
>
> "The offering words must be so clear that they distill all doubt. One custodially detained must know that as a prelude to interrogation he can have a government-furnished attorney if he is unable to engage one.
>
> "The edicts of Miranda have been violated." 396 F.2d 524, 535, 536.

The remaining failure in the government's proof is that the record is devoid of any evidence that even if the petitioner was properly warned pursuant to *Miranda*, that he then waived his constitutional rights. As this Court stated in *Miranda* quoting from an earlier decision, *Carnley* v. *Cochran*, 369 U.S. 506, 516, 8 L.Ed.2d 70, 77, 82 S.Ct. 884:

> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."
>
> *Miranda* v. *Arizona*, 384 U.S. 436, 475, 16 L.Ed. 2d 694, 724, 86 S.Ct. 1602.

Also see *People* v. *Edwin R. and Gerald Anonymous* (N.Y., Oct. 29, 1968) 4 Cr.L. 2142.

The record in this case shows a motion to suppress (T. 173, 176, A. 42); testimony of an F.B.I. agent that he overheard another agent "warn" the petitioner; then the con-

versation. There is no evidence at all of any waiver, and insufficient evidence of proper "warning" or intelligible offer of counsel prior to questioning, and here and now.

The Trial Court's error in admitting Agent Dallman's testimony as to the alleged oral statements of the petitioner over the petitioner's specific objection, requires that the conviction be reversed.

At the close of Agent Dallman's testimony, the Court ordered the furnishing of statements required by Section 3500, Title 18, U.S.C. and a written statement on an F.B.I. form entitled, "Form 302 of the Federal Bureau of Investigation", which written statement purportedly made by Special Agents Edward Kinzer, Jr., Ray F. Hogan and John E. Dallman, was furnished in compliance with Section 3500, Title 18, U.S.C. This statement described the arrest of Sam Joseph Battaglia on May 12, 1966 and contained, in written form, all of the conversation between Special Agent Dallman and the petitioner, Sam Joseph Battaglia as testified to by Special Agent Dallman. (S.A. 10-12). The written report was dated May 17, 1966, and obviously was in the possession of the government at the time of the motion by the defendant for the production of records of his confessions or statements, which motion was denied by the Court on the ground that the Government said there were none (A. 7, 8).

If said statements had been furnished to the petitioner, it would have enabled him to make an appropriate pretrial motion to suppress so that the trial court could determine the application of the *Miranda* decision and others to the statements made by the petitioner in custody.

It is argued that the Government's denial of the existence of such written or recorded statement on Novem-

ber 7, 1966, when it had in its possession a written record of the petitioner's confessions or statements since May 17, 1966, the date of the F.B.I. report containing the conversation between Agent Dallman and the petitioner, was a violation of Rule 16.

If the government, by some construction, contended that the conversations did not constitute a confession or record of a statement by the petitioner, then the very least the government could have done was to have informed the Court as to the nature and contents of the document it had in its possession.

The petitioner, if fully informed in the circumstances, could have made a motion to suppress the confessions or statements, if he thought that they were illegally obtained as indicated by insufficient warnings to the petitioner while he was in custody. The sanction provided under the provisions of Rule 16(g) of the Federal Rules of Criminal Procedure provides, among other things, that the Court may prohibit the party not complying with the Rule from introducing in evidence the material not disclosed.

Without doubt, the government sought to deprive the trial court and the defendant of pre-trial information concerning the statements educed from the petitioner and to surprise the defendant with them at the trial. The courts below permitted this, and thus committed reversible error.

The Petitioner was denied his right to procedural due process and to confrontation by and cross-examination of witnesses.

4. The petitioner filed a Motion for the Production, Inspection and Suppression of Evidence Obtained by Electronic Eavesdropping in the District Court (A. 7). The government answered by saying that the petitioner's motion did not specify any particular overhearings and was general in nature and therefore should be denied (A. 8). The District Court denied the petitioner's motion on that basis (A. 8).

In response to the petitioner's argument in the United States Court of Appeals for the Seventh Circuit that such procedure was error, the government filed a sealed exhibit with the court of Appeals which it said contained materials obtained via illegal electronic eavesdropping and asked the Court of Appeals to examine the material *in camera* and find it irrelevant to the instant case. This the Court of Appeals did (slip opinion page 7, App. 9).

When the petitioner argued on petition for rehearing that an *in camera* inspection by the Court of Appeals is improper and in conflict with this Court's holding in *Alderman* v. *United States*, ... U.S. ....., 22 L.Ed. 2d 176, the Court of Appeals again conducted an *in camera* inspection, and in a supplementary opinion on rehearing, again found that the material was irrelevant to the prosecution and found that the petitioner lacked standing (slip opinion page 2, App. 12).

It is argued that the action of the United States Court of Appeals for the Seventh Circuit in conducting *in camera* inspections is erroneous, in conflict with this Court's decision in *Alderman* v. *United States*, ..., U.S. ....., 22 L.Ed. 2d 176, and in violation of the petitioner's right to procedural due process of law as secured by the Fifth Amendment to the Constitution of the United States, and right to confrontation by and cross-examination of witnesses as secured by the Sixth Amendment of the Constitution of the United States.

It is argued that the judgment of the United States Court of Appeals for the Seventh Circuit and the judgment of conviction should be vacated and the cause be remanded to the District Court for the Northern District of Illinois, Eastern Division, for a full adversary hearing in accordance with this Court's decision in *Alderman* v. *United States*, ... U.S. ....., 22 L.Ed. 2d 176.

5. It is submitted that the Military Selective Service Act as it is being presently applied, and as it was being applied at the time that the indictment was returned, in this case, is unconstitutional.

Article I, Section 8 of the Constitution of the United States, gives the Congress of the United States the sole power to declare war.

At present, and for some time past, it is submitted that the United States of America has been engaged in an undeclared war in Vietnam, and it is submitted that the application of the Military Selective Service Act in inducting men in the Armed Forces of the United States and causing them to be sent to Vietnam to engage in that undeclared war, is in violation of Article I, Section 8 of the Constitution of the United States. The petitioner does not question the constitutionality of the Military Selective Service Act per se, but only questions its constitutionality in its application. The petitioner agrees with Justice Douglas as he stated in his dissenting opinion in *United States* v. *O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed. 2d 672, at p. 687:

> "The Court states that the constitutional power of Congress to raise and support armies is 'broad and sweeping' and that Congress' power 'to classify and conscript manpower for military service is "beyond

question".' This is undoubtedly true in times when, by declaration of Congress, the Nation is in a state of war."

But the petitioner also agrees with Mr. Justice Douglas when he states that,

> "The underlying and basic problem in this case, however, is whether conscription is permissible in the absence of a declaration of war." 391 U.S. 389, 20 L. Ed. 2d 687.

The petitioner does not even question the power of the Congress to raise and support an army during the time of peace, nor does the petitioner question the power of the President of the United States as Commander-in-Chief of the Armed Forces to initiate or respond to certain hostilities in the absence of a declaration by the Congress. The petitioner also does not question the ethics or the morality of the conflict in Vietnam. The petitioner does submit, however, that after a passage of time (in this case, years) when there has been no declaration by the Congress pursuant to their power in Article I, Section 8, Clause 11 of the Constitution, that the application of the Military Selective Service Act to provide manpower to the Armed Forces of the United States to enable those Armed Forces to conduct an undeclared war is unconstitutional, and for that reason, any conviction obtained for an alleged violation of the Military Selective Service Act when it is being so applied is invalid, and in particular, the conviction in this case is unconstitutional and invalid, and must be reversed.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully submits that his Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1968 — SEPTEMBER SESSION, 1968

No. 16861
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
SAM JOSEPH BATTAGLIA,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District Division.

March 17, 1969

Before HASTINGS, *Senior Circuit Judge,* and KILEY and FAIRCHILD, *Circuit Judges.*

HASTINGS, *Senior Circuit Judge.* In May, 1966, defendant Sam Joseph Battaglia was indicted by a federal grand jury charging violations of Section [redacted], Universal Military Training and Service Act, Title 50 App., U.S.C.A. § 462 (the Act).

Count I charged that on or about February 25, 1964, defendant willfully and knowingly made false statements to his local draft board, *i.e.*, that he was then living with his wife and that he had two children who were then living with him in his home. Count II charged that on or

about March 30, 1966, defendant willfully and knowingly made substantially the same false statements to his local draft board as in Count I. Count III charged that on or about December 5, 1964, defendant willfully and knowingly failed, neglected and refused to perform a duty required of him under §§ 451-473 of the Act, *i.e.*, to notify his local draft board of a change in circumstances which "might" have resulted in a change of his draft status, that is, his marriage had been dissolved on November 24, 1964.

The case was tried to the court, without the intervention of a jury. Defendant offered no evidence in the trial. The court found defendant guilty on Counts I and III and acquitted him on Count II. Defendant was sentenced to a term of four years on each of Counts I and III to run concurrently. Subsequently, the court ordered the sentences reduced to two years, pursuant to 18 U.S.C.A. § 4028(a)(2). Defendant appeals. We affirm.

Defendant first contends the evidence introduced by the Government was not sufficient to establish his guilt beyond a reasonable doubt under Counts I and III; therefore, that the court erred in denying his motions for acquittal. We must consider the evidence in the light most favorable to the Government. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942).

The evidence reveals to our satisfaction that prior to November, 1963, defendant lived with his wife and two children at 1440 N. First Avenue, Melrose Park, Illinois; he and his wife were separated in November, 1963, and he moved in with his parents in Oak Park, Illinois. Thereafter, he lived at various other addresses while his wife Elaine and his two children continued to live

at the Melrose Park address for several years. Elaine was granted an uncontested divorce from defendant on November 24, 1964 by decree of the Circuit Court of Cook County, Illinois. Defendant was married to his second wife, Kari, on March 27, 1966. On or about February 25, 1964, defendant willfully and knowingly falsified his answers on a questionnaire to his local draft board that his wife and two children were living with him at the Melrose Park address. Further, defendant willfully and knowingly failed, neglected and refused to notify his local draft board that his first marriage had been dissolved by divorce on November 24, 1964.

We have considered: the testimony of FBI Agent Dallman; defendant's former neighbor Joanne Anderson; his friend Beverly Preston; the district supervisor of defendant's local draft board, Dorothy S. Steinert; relevant exhibits in defendant's selective service file; pretrial motions, trial motions and post trial motions; exhibits and supporting affidavits tendered by defendant; as well as reported testimony of other witnesses. While of course not obliged to do so, defendant made no effort to refute the Government's case. Based on our examination of the record as a whole, we find and hold that the trial court was justified in finding defendant's guilt established beyond a reasonable doubt and did not err in denying defendant's motions for acquittal. *Glasser* v. *United States, supra; United States* v. *Adams*, 7 Cir., 403 F. 2d 840 (1968); *United States* v. *Sosa*, 7 Cir., 379 F. 2d 525, 527 (1967), *cert. denied*, 389 U.S. 845.

Defendant next asserts the trial court erred in denying his motion to dismiss the indictment based on the unconstitutional vagueness of the statute as applied to Count III and erred in denying his motion for arrest of judg-

ment. Defendant focuses his attack on the use of the words "might change a registrant's status" as reflected in his willful and knowing failure to report the fact that his marriage was dissolved by divorce in November, 1964. He contends that no applicable statute or regulation uses the word "might" as a governing standard. Defendant is in error.

32 C.F.R. § 1625.1 provides:

> "(a) No classification is permanent.
>
> "(b) Each classified registrant * * * shall, within 10 days after it occurs, report to the local board in writing *any fact that might result in the registrant being placed in a different classification* such as, but not limited to, any change in his occupational, marital, military, or dependency status, or in his physical condition." (Emphasis added.)

We find nothing vague or speculative in this regulation. The local boards are necessarily left with a discretionary power to be exercised under a variety of circumstances.

Defendant was not mislead or uncertain about his duty to keep his local board advised concerning his status. Witness his false statement shown under Count I. Further, there is the undisputed testimony of his girl friend Beverly Preston: "I had asked him why he hadn't been drafted yet, or why he wasn't in the Army, and he said that the Draft Board didn't know that he wasn't married."

Defendant charges he was denied equal protection of the laws as that right is guaranteed in the due process clause of the fifth amendment to the Federal Constitution. Specifically, he vigorously contends "that the action of the United States Attorney in bringing this prosecution and obtaining conviction, was arbitrary and discrimina-

tory'' in the face of ''the traditional practice of the federal government in 'draft' cases''. He asserts that where the defendant manifests a willingness to enter the Armed Forces, it is the practice of the Government to drop the prosecution ''no matter what the alleged violation was'' and give the defendant an opportunity to serve in the military service.

Defendant repeatedly stresses the fact, as shown by the Government's evidence, that from the time of his first arrest to the present he has consistently expressed his willingness to serve. Defendant correctly cites authority showing this practice has been followed in many cases. The trial court made reference to this in a colloquy with Government trial counsel and inquired whether the prosecution was being pressed because defendant's father was a reputed gangster. Defendant overstates the situation.

It is conceded that defendant could not be inducted into military service while his selective service file was in the hands of the United States Attorney; or while the instant criminal charge was pending; or while the subject judgment of conviction was unsatisfied of record. The trial court was fully advised of this, yet it declined to dismiss the prosecution and remove the record of conviction. In this refusal, defendant charges the trial court prejudicially erred.

In passing, we note that a similar plea was addressed to the Department of Justice. It made an independent examination of the file in the case and concluded the prosecution was not improper, and the case should continue to trial and disposition by judicial procedure. It is clear to us the United States Attorney complied with a consistent policy approved by the Department of Justice.

In considering the frequent cases where a defendant is granted the option of submitting to induction or facing prosecution, we usually find it applied when the violation charged is having refused to submit to an order to report for induction or having refused induction itself. By contrast, the instant case is concerned with false representation or the refusal to give information. We conclude that defendant has not been denied his constitutional rights in this respect.

We are not persuaded by defendant's contention that he was somehow denied due process of law because the Government "seized" his selective service file from his local draft board and thereby prevented him from being declared delinquent and processed for induction as a delinquent.

Defendant contends the trial court erred in admitting testimony, over objection, of oral statements made by him. He claims this is in violation of the standards set out in *Miranda* v. *Arizona,* 384 U.S. 436 (1966) and is inconsistent with Rule 16, Federal Rules of Criminal Procedure, 18 U.S.C.A. The testimony in question was that of Agent Dallman describing the arrest of defendant and stating his recollection of a conversation then had between Agent Kinzer and defendant.

The record discloses that defendant was given full and timely warnings of his constitutional rights as required by the rules laid down in *Miranda.* The trial court did not err in that respect.

Further, at the close of Agent Dallman's testimony, the trial court ordered the Government to furnish statements required by 18 U.S.C.A. § 3500, including a written statement on an FBI "Form 302." This form was a written

statement made by Agents Kinzer, Hogan and Dallman dated May 17, 1966. It contained the description of defendant's arrest on May 12, 1966 and of the conversations concerning which Dallman testified. The conversations took place in an auto in which defendant was being driven from his apartment in Melrose Park, Illinois to the Federal Building in Chicago, Dallman's subsequent dictation of his recollections took place five days later as indicated by the date on the written statement.

Defendant argues he was denied adequate discovery necessary to make a pretrial motion to suppress and determine the application of *Miranda* to statements made by defendant while in custody. This is so, he urges, since the Government had denied it had any statements or admissions subject to production under Rule 16 in answer to defendant's pretrial motion for production. At that time the Government took the position that "written or recorded statements" referred to in Rule 16(a)[1] did not include reports by agents of the Government of their recollections and interpretations of prior conversations with defendant. The Government conceded they were producible pursuant to 18 U.S.C.A. § 3500. This position seems well established. *United States* v. *Elife, D.C.S.D.N.Y.*, 43 F.R.D. 23, 24 (1967), citing *Campbell* v. *United States*, 373 U.S. 487 (1963).

The language of the rule makes pretrial production discretionary rather than mandatory. *United States* v.

[1] The 1966 amendment to Rule 16 provides in part:

"Upon motion of a defendant the Court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant * * *."

Garcia, D.C.S.D.N.Y., 272 F. Supp. 286, 289 (1967), citing in the same district court *United States* v. *Louis Carreau, Inc.*, 42 F.R.D. 408 (1967).

Production was furnished at trial pursuant to § 3500. We find no prejudice to defendant in the absence of this discovery; hence, no abuse of discretion. There was in point of fact no conflict over the facts to which Agent Dallman testified. We conclude the trial court did not prejudicially err in denying the pretrial discovery in issue.

On October 25, 1966, defendant filed a motion for the "Production, Inspection and Suppression of Evidence All Obtained by Electronic Eavesdropping." The Government's answer to this was a request that the motion be denied on the grounds that it was general and did not specify any particular conversation or communication. On November 18, 1966, the trial court denied such motion. Defendant charges error, relying on *Kolod* v. *United States*, 390 U.S. 136 (1968).

The instant case was tried almost two years before the decision in *Kolod*. No representations were made by the Government at trial or in its pretrial answer to the production motion with respect to the existence of unlawful electronic surveillance. The Government on brief (and in oral argument) now makes the following representation to this court:

> "The Department of Justice has advised the United States Attorney, and the United States Attorney hereby advises this Court that *the defendant was not the subject of, nor were any of his conversations ever monitored by any, unlawful electronic surveillance.*" (Emphasis added.)

Here there is no question presented of the arguable relevancy of eavesdropped information as in *Kolod*.

Defendant calls our attention to the belated acknowledgment by the Department of Justice of electronic eavesdropping upon Salvatore Battaglia, father of defendant, *United States* v. *Battaglia,* 7 Cir., 394 F. 2d 327 (1968); now pending on petition for certiorari.

Another copy of the logs furnished for in camera inspection in the father's case, and found utterly irrelevant to those convictions, *United States* v. *Battaglia,* 394 F. 2d at 328, has been tendered here for filing and to be held in camera. Defendant objects. Since defendant makes argumentative mention of the action in the father's case as somehow having relevance to his claim for reversal here, we now grant the Government's motion. Following submission of this appeal, we now make an in camera inspection of the logs in question to determine their relevance, if any, to the instant prosecution.

A careful in camera inspection of the transmitted material reveals that these conversations were utterly irrelevant and unrelated to the prosecution of the instant defendant. They provide no basis for the reversal of the conviction at hand.

Finally, defendant asserts the Act *as applied to him in this case* is unconstitutional. He contends, *inter alia,* that the United States is engaged in an undeclared war in Viet Nam. In this case, however, defendant was found guilty as charged in Counts I and III of the indictment, *i.e.,* of falsifying certain information to his local draft board and failing to report a change in status. He was not inducted into the Armed Forces of the United States. He was not ordered to report for induction. There is no showing in this record that in 1964, the date of the charged offenses, had defendant been inducted he would

have been sent to Viet Nam. Without conceding that the constitutional question is properly before us for decision on its merits, we find and hold that defendant lacks standing to raise the question. *United States* v. *Mitchell*, D.C.D.Conn., 246 F. Supp. 874, 898 (1965). *Cf. United States* v. *Bolton*, 2 Cir., 192 F. 2d 805, 806 (1951), on a similar question concerning the Korean War.

The judgment of the district court is affirmed.

AFFIRMED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX "B"

In the

United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1968 — APRIL SESSION, 1969

No. 16861

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
SAM JOSEPH BATTAGLIA,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District Division.

May 7, 1969

ON PETITION FOR REHEARING

Before HASTINGS, *Senior Circuit Judge*, and KILEY and FAIRCHILD, *Circuit Judges.*

PER CURIAM. On consideration of the petition of Sam Joseph Battaglia, defendant-appellant, for a rehearing of the above case heretofore decided by opinion on March 17, 1969; and it appearing from said petition that, *inter alia,* defendant-appellant relies on *Alderman* v. *United States,* ..... U.S. ....., (March 10, 1969), 37 L.W. 4189, and points to the material which resulted from electronic eavesdropping upon defendant-appellant's *father,* and which we previously examined *in camera.*

We have now re-examined the *in camera* material and find, at stated in our opinion, that not only is this material utterly irrelevant to this prosecution, but *there is no suggestion either within the material or in the representations made concerning it that the overheard conversations were defendant-appellant's own, or took place in his premises,* or even, in fact, took pleace within his presence and hearing. As we read *Alderman* and the related cases, defendant-appellant does not show he is entitled to further relief.

Finding no valid reasons for a rehearing on any grounds advanced in the petition, it is ordered that the same be and now is in all respects denied.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

SUPPLEMENTAL APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BARRY JEROME WALLACE, *Appellant*	)	
v.	)	No. 24744
UNITED STATES OF AMERICA, *Appellee*	)	

MOTION
(Filed July 11, 1967)

The Appellee, the United States of America, by its Attorney, Donald H. Fraser, United States Attorney for the Southern District of Georgia, moves the Court to vacate the judgment of the United States District Court for the Southern District of Georgia, entered on February 15, 1967, and to remand the above-stated case with instructions to dismiss the indictment upon full compliance by defendant with his Local Board's Order to report for and submit to induction, to the United States District Court for the Southern District of Georgia.

As grounds for this motion, the United States of America shows that it is the policy of the Department of Justice not to prosecute violations of the Universal Military Train-

ing and Service Act if such violation was not flagrant and the registrant is willing to submit to the induction procedure.

Donald H. Fraser
United States Attorney
Richard C. Chadwick
Richard C. Chadwick
Assistant United States Attorney
Southern District of Georgia
Attorney for Appellee
P.O. Box 979
Savannah, Georgia

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has on this date served a true copy of the foregoing motion by mailing same to Messrs. Jack Greenberg, 10 Columbus Circle, New York, New York; Howard Moore, Jr., 859½ Hunter Street, N.W., Atlanta Georgia; Thomas F. Walsh, P. O. Box 75, Savannah, Georgia, and Charles Morgan, 5 Forsyth Street, N.W., Atlanta, Georgia, Attorneys for Appellant.

This 7th day of July, 1967.

Richard C. Chadwick
Richard C. Chadwick
Assistant United States Attorney

MEMORANDUM TO SUPPORT MOTION TO VACATE AND REMAND

Statement

Barry Jerome Wallace was convicted of failure to report for induction and of failure to keep his local board advised of his current address in violation of the provisions of the Universal Military Training and Service Act. He

was given the maximum penalty of five years' imprisonment and $10,000 fine on each count, to run consecutively.

Wallace registered in 1962 with Local Board No. 26, Selective Service System, Savannah, Georgia. He listed his address as 512 West 33rd Street, Savannah, Georgia, and gave the name of his mother, residing at the same address, as a person who would always know his address.

In 1964 Wallace became a field worker with the Southern Christian Leadership Conference (SCLC) working out of the Atlanta, Georgia, office of that organization. His duties required him to move from place to place, staying varying periods of time in each locality. He maintained no permanent residence other than at his mother's home to which he would return for brief visits.

On April 21, 1966, the local board mailed an Order to Report for Induction to Wallace. The Order was directed to 512 West 33rd Street, Savannah, Georgia. Wallace reported as ordered and was ready and willing to submit to induction but was found not acceptable for induction under current standards because of a wound in his arm. The Armed Forces Examining and Entrance Station advised the local board the reevaluation of Wallace by the Selective Service System in one month was believed justified. Wallace returned to his mother's residence but left in a few days to continue his field work with SCLC. He instructed his mother to forward any mail from the local board to the Atlanta office of SCLC for transmittal to him in the field.

On June 21, 1966, the local board by letter directed to 512 West 33rd Street, orderd Wallace to report for induction in Savannah on July 7, 1966. Wallace's mother testified at the trial that a piece of mail from the local board was delivered to her home around the end of June,

1966, was forwarded unopened to the Atlanta office of SCLC. Wallace testified that he received the order in Albany, Georgia, on July 10, 1966. He was unable to contact his local board by telephone until July 18, 1966, at which time he was advised to go to the local board in Albany and request a transfer of his file. Wallace stated that he made such a request and was informed that the Albany local board could do nothing until his file was transferred from Savannah. He left his local address with the Albany local board. On July 20, 1966, Local Board No. 26 (Savannah) advised Wallace by written communication that since a request for transfer had not been received, the matter would be referred to the Federal Bureau of Investigation unless he reported to the local board by July 27, 1966.

Local Board No. 26 reported Wallace delinquent to the United States Attorney on August 11, 1966, and the Federal Bureau of Investigation was requested to conduct an investigation on August 18, 1966. Wallace departed for Savannah on August 26th after being advised by his brother that he was being sought. He contacted the local board on August 29, 1966, the first day of the board's regular office hours after his return to Savannah, and was advised that the matter had been turned over to the Federal Bureau of Investigation. The clerk of the local board stated that Wallace again gave 512 West 33rd Street as his current address. Wallace denied this. On the same day the Federal Bureau of Investigation was unable to contact Wallace at that address and learned that his mother had moved a month prior to a new address. The following day Wallace voluntarily appeared at the office of the Federal Bureau of Investigation for interview during which he advised that he had not wilfully failed to report for induction and was then and there willing to submit to induction.

Discussion

The Department of Justice has a responsibility for the control of Government litigation that is not confined to avoidance of legal error but extends to the formulation and implementation of enlightened and prosecutorial policies. The Universal Military Training and Service Act is a comprehensive statute designed to provide an orderly, efficient, and fair procedure for marshalling the available manpower of the country for its defense in times of peril. The purpose of the Act is to provide men for the military establishment.

Where persons have violated the provisions of the statute and are subject to prosecution thereunder, it is the tacit policy of the Department of Justice not to prosecute if the violation was not flagrant and the registrant is willing to submit to the induction procedures. This policy has been adopted because it is more beneficial to the Government to have the registrant serving in the Armed Forces than in a penitentiary.

Wallace's violation does not appear to be flagrant. He reported for induction on May 11, 1966, and apparently would have submitted if he had been found acceptable for service. He has consistently expressed a willingness to serve in the Armed Forces; he so stated to the Federal Bureau of Investigation prior to his indictment; he testified to that effect at his trial; and we have been informed that he is presently willing to submit to induction. Wallaces's failure to keep his local board advised of his current address is based upon the incorrect address he allegedly gave to the clerk on August 29, 1966. The incident, if true, seems of little consequence not only because the matter was then out of the hands of the local board by

referral to the United States Attorney, but also because Wallace made his whereabouts known by his voluntary appearance at the Federal Bureau of Investigation office on the following day.

Because there may be some doubt as to the actual existence of the necessary scienter and in view of the above-indicated policy, the Department would not have authorized this prosecution if the entire factual situation had been known, unless the defendant had refused to be inducted after being given a further opportunity to submit.

We know of no obstacles to the Court's granting a motion to dismiss an indictment pending appeal from a judgment of conviction. The outstanding judgment must, of course, first be vacated in order to dismiss the indictment, but since the judgment is before this Court on direct review, it has not yet become final and is within the power of this Court under the provisions of Section 2106, Title 28, United States Code. *Petite* v. *United States*, 361 U.S. 529.

Conclusion

For the foregoing resaons it is respectfully submitted that this motion should be granted and that an order should be entered vacating the judgment of the district court and remanding the case to the district court with instructions to dismiss the indictment upon full compliance by the defendant with his order to submit to induction.

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 24744

BARRY JEROME WALLACE,
Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S RESPONSE TO THE MOTION OF THE UNITED STATES TO VACATE AND REMAND
(Filed July 18, 1967)

Appellant has been informed by his undersigned counsel of the government's motion to vacate the judgment herein and to remand the above-stated case with instructions to dismiss the indictment upon full compliance by appellant with his Selective Service Board's orders to report for and submit to induction. Appellant has informed undersigned counsel of his willingness to report for and submit to induction and concurs in the government's request for relief.

This said, appellant's counsel feels constrained to add a few words. Without rehashing the record or the briefs we have filed, it is clear that this case involves a miscarriage of justice. The government's memorandum concedes as much, for it states that appellant's case fits within a class the Department of Justice does not prosecute as a matter of policy. Thus, even if the worst face possible be put on appellant's conduct it should not have resulted in criminal prosecution much less four months imprisonment

for failure to raise excessive bail. And, we continue to believe that the record shows by convincing evidence that appellant's conduct was totally innocent; that he is entitle to reversal of the judgment as a matter of right.

We review these matters briefly because there is the risk, inherent in any confession of error by the government, that future associates, employers and acquaintances of appellant will misinterpret this court's vacation of the judgment and see in it the reflection of some technical failure by the United States rather than the facts of appellant's ill-starred attempts to satisfy his military obligation. We suggest, with all deference, that some articulation of the facts and circumstances of appellant's conviction and sentence will minimize the potential for this sort of mischief affecting this young man's future.

Respectfully submitted,

Michael Meltsner
Jack Greenberg
Charles Stephen Ralston
10 Columbus Circle
New York, New York
Howard Moore, Jr.
859½ Hunter Street, N.W.
Atlanta, Georgia
Charles Morgan, Jr.
5 Forsyth Street, N.W.
Atlanta, Georgia
Thomas F. Walsh
P. O. Box 75
Savannah, Georgia
Attorneys for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has on this ..... day of July, 1967 served a true copy of the foregoing Response by depositing same in the United States mail, air mail, postage prepaid, addressed to Honorable Donald H. Fraser, United States Attorney, P. O. Box 979, Savannah, Georgia and Honorable Ramsey Clark, Attorney General, Department of Justice, Washington, D. C.

.....

Attorney for Appellant

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24744

BARRY JEROME WALLACE,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

— — — — —

Appeal from the United States District Court for the Southern District of Georgia

— — — — —

Before BROWN, Chief Judge, JONES and GOLDBERG, Circuit Judges.

BY THE COURT:

On consideration of the motion filed by appellee, in the above styled and numbered cause, to vacate the judgment of the District Court and remand with instructions to dismiss the indictment against appellant, and of appellant's response filed in opposition thereto,

IT IS ORDERED that appellee's motion to vacate the judgment and remand with instructions to dismiss the indictment be hereby GRANTED.

FEDERAL BUREAU OF INVESTIGATION

Date 5/17/66

SAM JOSEPH BATTAGLIA, Apartment 8, 7321 West Fullerton Avenue, was arrested at this address at approximately 8:00 p.m. He was immediately advised of the nature of the charge against him and the identity of the arresting Agents. He was advised that he did not have to make a statement by SA EDWARD KINZER, JR.; that any statement he did make could be used against him in a court of law and that he had the right to consult an attorney or anyone else prior to making a statement. He was further advised that if he could not afford to hire an attorney, the court would appoint one for him. He furnished the following information:

He stated that he believed that it was correct that he had not advised his Local Selective Service Board that he was divorced from his first wife. He noted, however, that he was sent a form by Selective Service in March, 1966, at which time he informed his Board that he was remarried.

In reference to his divorce, he mentioned that he separated from his wife around November, 1963, at which time he went to live with his parents in their home in Oak Park, Illinois. He subsequently moved on a number of occasions and is currently residing at this address with his new wife, KARI DE ORIO BATTAGLIA, whom he married in March of this year. He recalled that his divorce was final in either late November or early December, 1964.

At that time the court awarded his wife $50.00 a week for the support of their two children.

During the entire year 1965, he was unemployed, but since the first of this year has been employed as a coin machine collector by the Queen Wash Speed Dry Service, which company has washing machines and drying machines placed in a number of apartments in and around Chicago. It is his job to collect the coins from these machines for this company. This company is operated by JOSEPH AMABILE, who also runs the El Morrocco Night Club in Northlake, Illinois. During 1965, since he was unemployed, his father, SAM BATTAGLIA, paid the child support payments to his former wife, ELAINE. Since he has been employed this year, he is now making these payments.

For a few months during 1964, he stayed at the O'Hare Kitchenettes West on Mannheim Road south of O'Hare Airport. While staying at this motel, he may have used the name SAM JOSEPH.

Concerning his employment during the year 1964, he recalled that one LARRY ROSENBERG hired him for Mayfair Acceptance Corporation where he worked for a number of months during that year. He did not recall ever having worked for an organization known as Dearborn Advertising.

Regarding his Selective Service status, he related that he had never attempted to enlist in the military service and since registering for Selective Service had not been called by his Local Board. He felt that he had no physical or mental handicaps which would keep him from serving in the military service and should he be required to go, he would be willing.

Concerning his children by his first marriage, he related that their names are ANGELA, age 5, and MARIA, age 3. They both reside with their mother, ELAINE, at 1440 North First Avenue, Melrose Park, Illinois, but occasionally visit with him.

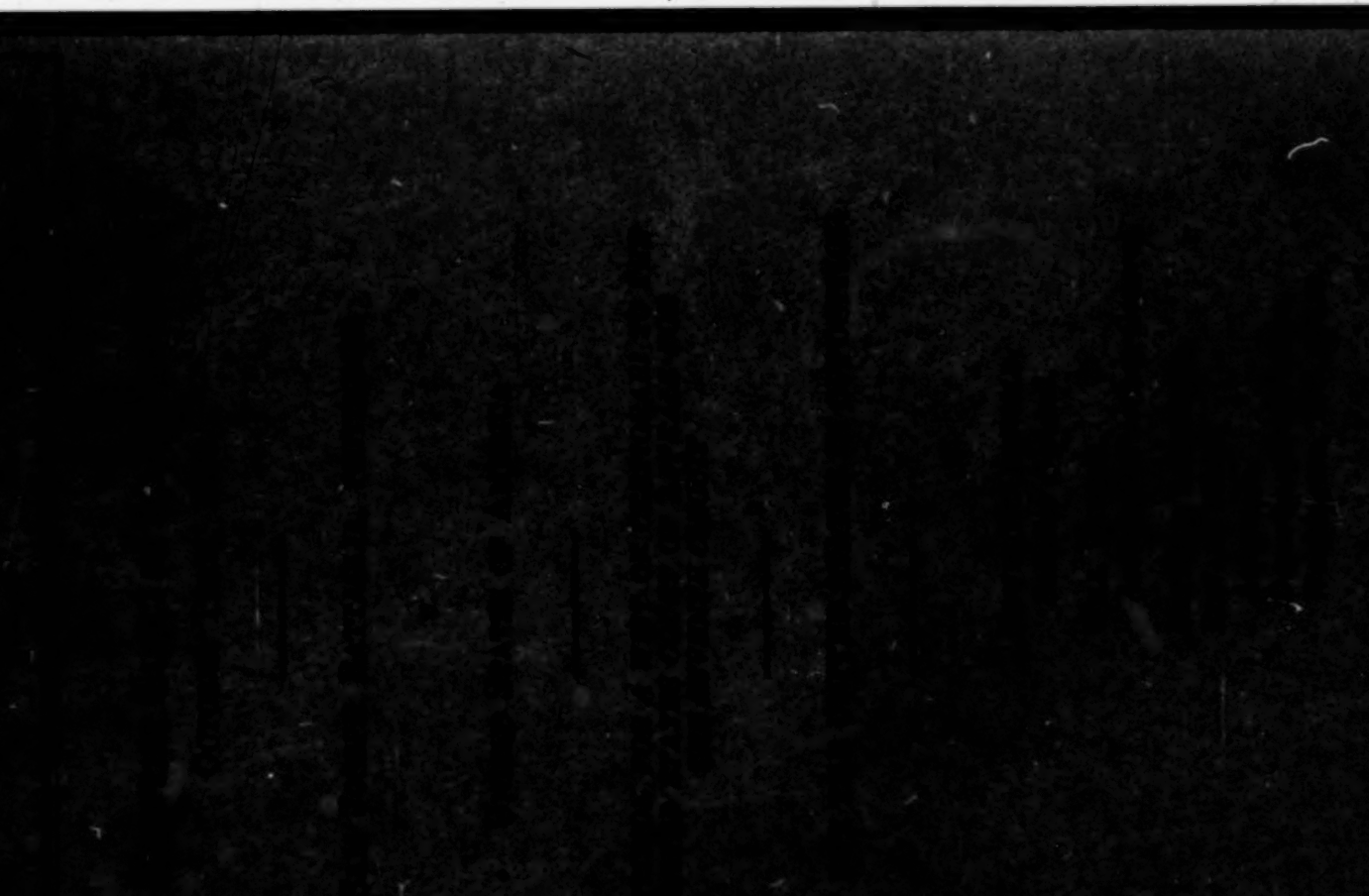
He advised that living with his parents in Oak Park is one MARGARET SALVATORE, whom he refers to as his aunt. She is the sister of ROCCO SALVATORE. He did not know, however, what their exact relationship was to his family but did know that it was on his mother's side of the family that they were related. He stated MARGARET SALVATORE was not employed to his knowledge.

The following description of the subject was obtained from interview and observation:

Name—SAM JOSEPH BATTAGLIA,
aka Sam Joseph
Race—White
Sex—Male
Born—February 26, 1944, Chicago, Illinois

On 5/12/66 at Elmwood Park, Illinois File #CG 25-45742
by SAs Edward Kinzer, Jr.; Raymond F.
Hogan and John E. Dallman/cms

Date dictated 5/17/66



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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 202

SAM JOSEPH BATTAGLIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinions of the court of appeals (Pet. App. 1-10, 11-12) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1969. A petition for rehearing was denied on May 7, 1969. The petition for a writ of certiorari was filed on June 6, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the verdict.

2. Whether petitioner's prosecution represents a proper, discretionary effectuation of the Selective Service laws.

3. Whether, in the instant circumstances, the trial court properly received petitioner's admissions to the arresting officers into evidence.

4. Whether the government illegally suppressed evidence against petitioner.

5. Whether petitioner has standing to challenge the constitutionality of the Selective Service Act on the ground that American involvement in the Vietnam conflict is unlawful.

STATEMENT

After a jury-waived trial, petitioner was convicted in the United States District Court for the Northern District of Illinois of making a false statement to his Selective Service board (Count 1), and of failing to notify his board that his marriage had been dissolved (Count 3), in violation of 50 U.S.C. App. 462. On February 7, 1968, he was sentenced to concurrent terms of two years' imprisonment, in lieu of a vacated prior sentence of four years' imprisonment imposed on November 29, 1967.

The evidence showed that on February 25, 1964, petitioner, then twenty years of age (4 R. 86),[1] returned

[1] "R." preceded by a volume number refers to the five-volume record that we are presently lodging with the Clerk

a current questionnaire (Govt. Exh. 2a) to his local board (4 R. 32).[1] The questionnaire, signed by petitioner (R. 32, 48), indicated that he was living with his wife and two children at an address in Melrose Park, Illinois (4 R. 47, 88, 319; Govt. Exh. 2a). As a result, petitioner was classified III-A (dependency deferment) (4 R. 22, 33, 40, 48-49). A III-A classification is proper if a registrant maintains a bona fide parent-child relationship with his children. If such relationship does not exist, then a III-A classification is proper only if the children are dependent upon the registrant for support (4 R. 50-53).

A former friend of petitioner, Miss Preston, testified that starting in early 1963 she commenced seeing petitioner "just about every night" (4 R. 280). In October 1963, she visited petitioner's Melrose Park apartment and had a conversation with his wife (4 R. 281). Soon afterwards, petitioner told Miss Preston that subsequent to this conversation, his wife had left him (4 R. 281-285). Petitioner later told Miss Preston that he was living with his mother in Oak Park (4 R. 286, 292, 294), or at various apartments other than the one he had shared with his wife and children (4 R. 292-296). In February or March 1964, petitioner told her he did not support his children, but that his father supported them (4 R. 304-

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of this Court. The first three volumes are pre-trial and post-trial transcripts, volume 4 is the trial transcript, while volume 5 is the record proper. The original exhibits are also being lodged.

307). Miss Preston testified that in 1966 she had asked petitioner why he had not been drafted and that petitioner had told her that "the Draft Board didn't know that he wasn't married, they still thought he was married" (4 R. 297).

A neighbor at the Melrose Park address where petitioner had resided with his wife and children stated that he had moved out of the apartment in the fall of 1963, but that his wife and children continued to reside there (4 R. 271-273). Before petitioner's departure, she had seen him "every other day or so," but thereafter she did not see him or his car (4 R. 275-276).

Petitioner and his wife were divorced in November 1964 (4 R. 114; Gov't Exh. 3). In 1966, when petitioner returned a current information questionnaire to his draft board, he indicated that he had contracted a 1966 marriage and that his children lived with him (Govt. Exh. 2b).

Two of the F.B.I. agents who arrested petitioner in May 1966 informed him of the nature of the charge, a Selective Service violation, and of his rights against self-incrimination (4 R. 178-179). They then asked him questions concerning his marital and Selective Service status. Petitioner replied that he had separated from his wife about November 1963, and had started living with his parents in Oak Park while his wife continued to live at the address in Melrose Park (4 R. 185, 190). He said that his divorce became final in November 1964, and that he did not believe he had advised the draft board of his divorce from his former wife (4 R. 182).

ARGUMENT

1. Petitioner attacks the sufficiency of the evidence as to the falsity of his statement that in February 1964 he was living with his wife and children (Pet. 21-25). However, uncontradicted evidence that showed the falsity came from petitioner's former neighbor, his former girl friend (Miss Preston), and from petitioner's own admissions to the F.B.I. The issue raised by the testimony was largely one of credibility to be determined by the trier of the facts. *E.g.*, *Hawk* v. *Olson*, 326 U.S. 271, 279. In the instant case, the evidence from each of the three sources tended to corroborate the information furnished by the others. It permitted the trial court to conclude that after Miss Preston, in late 1963, spoke with petitioner's wife, petitioner and his wife became estranged, and that petitioner had moved from the Melrose Park apartment prior to the time he filed his questionnaire with his local board in February 1964. The trial court was warranted in concluding that petitioner's claim of residence with his wife and children was willfully and knowingly false, and made in the expectation that it would avoid reclassification (4 R. 50-51, 304-307).

Petitioner attacks Count 3 on the basis of vagueness, arguing that he had no way of knowing that a divorce "*might*" change his draft status (Pet. 25-26). The underlying regulation (32 C.F.R. 1625.1; Pet. App. 4) requires each registrant, within ten days of the occurrence, to report to the local board any fact that might result in the registrant being

placed in a different classification. It gives as an example, "any change in his * * * marital * * * status" *(ibid.)*. Clearly, then, whatever may be said of other facts which might cause some uncertainty or confusion for a registrant, as to changes in marital status the language used in the regulation lacked neither clarity nor precision. See *Cameron* v. *Johnson*, 390 U.S. 611, 616. Petitioner obviously knew that his divorce had to be reported to Selective Service officials. In speaking to Miss Preston in 1966, he attributed his civilian status to the fact that his draft board had not learned of his 1964 divorce (4 R. 297).

2. Petitioner asserts that his prosecution was undertaken in bad faith because of his father's gangland connections (Pet. 26-32). He asserts that this is shown by the fact that he was prosecuted even though, at the time of his arrest in 1966, he offered to enter the military service voluntarily. He asserts that the refusal to allow him to do so, in lieu of criminal prosecution, is contrary to a tacit government policy as set forth in the government's brief in *Wallace* v. *United States* in the Fifth Circuit (Pet. 28-29). As there stated, however, prosecutions have been dismissed where defendants are willing to be inducted "if the violation was not flagrant." Affirmative acts of misrepresentation, such as are involved here, are regarded as flagrant violations. Where that is the situation, it is not the policy of the Department of Justice to refrain from prosecutions or to

dismiss a prosecution because of a defendant's willingness to submit to induction.[2]

3. Petitioner's principal contention[3] regarding the admissions he made to the agents appears to be that since the government failed to negate the possibility that petitioner wanted counsel present when interviewed, it was error to allow the admissions into evidence (Pet. 32-35). At trial, defense counsel requested a hearing concerning the presence of counsel, and one was held (4 R. 176-182). The crucial issue for the trial court to determine was whether the words of the agents, in the context used and considering the age, background and intelligence of the defend-

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[2] While petitioner quotes a portion of the trial court's pre-trial comments regarding a supposed "vendetta" against him (Pet. 27), reference to the record indicates that this was intended only as an inquiry (1 R. 5). Petitioner's statement that the trial court recognized "the arbitrary, capricious, and discriminatory nature of the instant prosecution" (Pet. 27) attributes more to the judge than he said. After referring to the possibility of prosecution because of having a gangster father, the court immediately added that such relationship "has nothing to do with due process if there is in fact a falsification of the classification questionnaire in the first instance [in 1964]" (2 R. 11).

[3] Petitioner also attacks the failure to call the government agent who gave the warning to petitioner and his lack of "great detail" (Pet. 33). The fact that the agent who gave the warning did not testify concerning it did not detract from the sufficiency of the warning which another agent testified was given. Petitioner misreads the record when he states that Agent Dallman testified that Agent Kinzer gave only a limited explanation as to petitioner's rights. It was the description of the offense of which petitioner was suspected that was curtailed, not being as full as the complaint which led to the issuance of the arrest warrant (4 R. 212-213).

ant, imparted a clear, understandable and constitutionally adequate warning of his rights. *Coyote* v. *United States*, 380 F. 2d 305, 308 (C.A. 10), certiorari denied, 389 U.S. 992. Agent Dallman testified that Agent Kinzer told petitioner that he was under arrest, and that (4 R. 179)

> * * * he did not have to make any statement to us, that any statement he made could be used against him in court; he told him he had a right to consult with an attorney or consult with anybody else if he so desired prior to making a statement, and if he could not afford an attorney the could [sic] would appoint one for him.

This warning, given in May 1966, complies with that approved in June 1966 when this Court commended this F.B.I. warning as being worthy of emulation by state and local enforcement agencies. *Miranda* v. *Arizona*, 384 U.S. 436, 484-486; *United States* v. *Fisher*, 387 F. 2d 165, 169 (C.A. 2), certiorari denied, 390 U.S. 953. The warning served to tell petitioner that he could consult with counsel before he utterred a syllable to the F.B.I. agents. Clearly, if petitioner did not wish to consult with counsel before he answered questions, he did not wish one present when he did speak.[4] See *United States* v. *Vanterpool*, 394 F. 2d 697 (C.A. 2).

Petitioner's reliance on *Lathers* v. *United States*, 396 F. 2d 524 (C.A. 5) is misplaced (Pet. 34-35).

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[4] Petitioner is neither illiterate nor unintelligent. He has worked as an assistant plumber, bookkeeper, and collector (Pet. 25), and had acquired bank and credit references (4 R. 144-145).

Unlike in the present case, Lathers was not told that he could consult with an attorney prior to making a statement (see 396 F. 2d at 533). The import of the advice Lathers received was "only that a judge or commissioner somewhere down the line would appoint a lawyer for him if he so requested" (396 F. 2d at 535). All things considered, petitioner "was given full and timely warnings of his constitutional rights," as the court below concluded (Pet. App. 6); his admissions were thus properly received in evidence.

4. Petitioner complains of the electronic surveillance of his father [5] and contends he has the right to examine the logs relating to that surveillance. Since, however, petitioner himself was not overheard, the controlling decision is not *Alderman* v. *United States*, 394 U.S. 165, on which petitioner relies, but *Taglianetti* v. *United States*, 394 U.S. 316. In the latter case this Court held, with respect to electronic eavesdropping, that since the defendant "was entitled to see a transcript of his own conversations and nothing else" he "had no right to rummage in government files." In the instant case, there are no transcripts of any conversations of petitioner, and he is not entitled to see those pertaining to his father, transcripts which the court of appeals has examined *in camera* and found to be without any relevancy whatever to petitioner (Pet. App. 9).

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[5] Petitioner's father was prosecuted for a Hobbs Act violation. See *United States* v. *Battaglia*, 394 F. 2d 304 (C.A. 7).

Petitioner also claims that the agent's report of his oral statements after arrest should have been turned over before trial under Rule 16, F.R. Crim. P., as "written or recorded statements or confessions made by the defendant." In answer to petitioner's motion for discovery, the government formally stated its position that "oral statements of a defendant made to Government agents do not constitute 'written or recorded statements' as that phrase is used in Rule 16" (5 R. 46). The trial court thereafter denied the motion (5 R. 48). There was thus no suppression of the fact of the oral statements, but a refusal to turn them over before trial which has decisional support. *United States* v. *Elife*, 43 F.R.D. 23 (S.D. N.Y.). Moreover, under Rule 16, F.R. Crim. P., the question of whether evidence should be produced is committed to the discretion of the Court. *United States* v. *Jordan*, 399 F. 2d 610, 615 (C.A. 2), certiorari denied, 393 U.S. 1005. In any event, a hearing was held on the admissibility of the statements and the reports of the agents were turned over at trial under 18 U.S.C. 3500. Petitioner was in no way prejudiced by not obtaining the reports earlier.

5. Petitioner's allegation that the draft is unconstitutional because the Vietnam conflict constitutes an undeclared war provides no defense to a prosecution for knowingly making false statements to the draft board. See *Dennis* v. *United States*, 384 U.S. 855, 865-867. Moreover, petitioner lacks standing to make such a claim. See *United States* v. *Mitchell*, 369 F. 2d 323 (C.A. 2) certiorari denied, 386 U.S. 972. At all

events, it is not a contention on which petitioner is entitled to prevail on the merits. See, *e.g.*, *Luftig* v. *McNamara*, 373 F. 2d 664 (C.A. D.C.), certiorari denied, 387 U.S. 945; *Mora* v. *McNamara*, 387 F. 2d 862 (C.A. D.C.), certiorari denied, 389 U.S. 934.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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